Marquette Transportation/Bluegrass Marine *and* Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO. Case 26–CA–18650

February 27, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 30, 1999, Administrative Law Judge Lawrence W. Cullen issued the attached decision finding, among other things, that the pilots at issue were not supervisors and that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating them for participating in a strike and by making various statements to its pilots. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed reply briefs. The General Counsel filed cross-exceptions with a supporting brief, the Charging Party filed an answering brief concurring with the General Counsel's cross-exceptions, and the Respondent filed an answering brief to the General Counsel's cross-exceptions. On June 28, 2001, the National Labor Relations Board issued an order remanding the proceeding to the judge for further consideration in light of *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001); and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000).

On August 28, 2001, the judge issued the attached supplemental decision on remand, finding that the pilots were supervisors and that, therefore, the Respondent had not violated the Act. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed answering briefs, and the Charging Party filed a reply brief. The Respondent filed cross-exceptions[1] and a supporting brief, to which the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision on remand, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions in the supplemental decision on remand and to adopt the recommended Order set forth in that supplemental decision.[3]

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. February 27, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Rosalind Thomas, Esq., for the General Counsel.

Bart Sisk, Esq. (The Kullman Firm), of Memphis, Tennessee, for the Respondent.

Samuel Morris, Esq. (Allen, Godwin, Morris, Laurenzi & Bloomfield), of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on May 24 and 25, 1999, in Memphis, Tennessee. The complaint, as amended at the hearing is based on an amended charge filed by Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO (the Charging Party or the Union), and alleges that Marquette Transportation/Bluegrass Marine (the Respondent or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The complaint is joined by Respondent's answer thereto as amended at the hearing wherein it denies the commission of any violations of

[1] In light of our disposition of the case, we find it unnecessary to pass on the Respondent's cross-exceptions.

[2] The General Counsel and the Charging Party have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge recommended dismissal of the complaint because the barge pilots, alleged as discriminatees, were statutory supervisors.

Member Liebman concurs in the dismissal only because she acknowledges that the material facts concerning the supervisory issue cannot be meaningfully distinguished from those in current Board precedent involving the same pilot classification in which supervisory status was found. See *Alter Barge Line, Inc.*, 336 NLRB 1266 fn. 1 (2001); *Ingram Barge Co.*, 336 NLRB 1259 fn. 1 (2001).

the Act and asserts certain affirmative defenses thereto. Prior to the close of hearing the General Counsel moved to amend paragraph 7 of the complaint by adding an allegation based on testimony elicited at the hearing. On Respondent's objection therein, I withheld ruling and directed the parties to address this in their posthearing briefs. Upon further review I grant this motion and note Respondent's denial thereto. That allegation is that Respondent's president, John Eckstein, told employees at the January 22, 1998 meeting that if they discussed Pilots Agree while on the vessel or used company equipment to discuss the Union, they would be dealt with.

On the entire record, including the testimony of the witnesses, and exhibits submitted and after review of the briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material herein during the 12-month period ending November 30, 1998, Respondent has been a corporation with an office and place of business located in Paducah, Kentucky, where it has been engaged in the business of providing towboat and barge inland waterway transportation services, and purchased and received at its facility, goods valued in excess of $50,000 directly from points outside the State of Kentucky, and has derived gross revenues in excess of $50,000 for the transportation of freight in interstate commerce under arrangements with and as agent for various common carriers, each of which operates between various States of the United States and has accordingly functioned as an essential link in the transportation of freight in interstate commerce and has performed services in excess of $50,000 in states other than the State of Kentucky and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent denies and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

A. The 8(a)(1) Allegations

Facts

Pilots Agree is a labor organization made up of inland waterway tugboat pilots and captains formed to address issues of safety, working conditions and pay and other terms and conditions of employment. The employees involved in this case testified that they initially learned of Pilots Agree in the fall of 1997 through radio contact and word of mouth with other pilots and captains on the river. In January of 1998, Pilots Agree sent requests for recognition to numerous tugboat companies operating on the inland waterways seeking recognition and bargaining on behalf of their employees who were employed as captains and pilots. When the various tugboat companies including Respondent, failed to comply with the demand for recognition and bargaining, Pilots Agree called a strike at midnight on April 3, 1998, and many of the captains and pilots including several employed by Respondent, pulled their boats to shore in support of the strike.

Respondent's President John Eckstein conducted a meeting on January 22, 1998, along with several other members of Respondent's management, with certain of Respondent's pilots and captains concerning work-related matters. Near the end of the meeting Eckstein brought up the subject of Pilots Agree and inquired if any of the pilots and captains were members and allegedly threatened its employees with discharge if they engaged in union activities. Eckstein testified at the hearing that he had learned of Pilots Agree on the internet. Robert Sharp, who was then employed as a pilot by Respondent and who attended this meeting, testified that at the end of the meeting President Eckstein spoke and asked the employees at the meeting, whether they were members of Pilots Agree and that Eckstein also stated that he would not recognize or negotiate with the Union and that he would "release" anyone who was connected with the Union. Sharp testified that Eckstein said he had "heard the Union was having a meeting and I won't spy on you but if you go, you will be released." Steve Colby, Respondent's port captain and a Section 2(11) supervisor, testified that at this meeting Eckstein asked for a show of hands of those in attendance at the meeting who were members of Pilots Agree. He testified he did not remember whether there was any discussion of the consequences to employees, if they walked out in support of Pilots Agree. Respondent's General Counsel, Greg Minton, who also attended this meeting testified he was at the second half of the meeting and that the subject of Pilots Agree was brought up and that Eckstein addressed the group and talked about the adverse impact on employees because of competition. He testified he did not recall any discussion of the employment status of those employees who supported Pilots Agree and did not otherwise specifically recall Eckstein's remarks. Respondent's Vice President of Traffic and Sales Darin Adrian, who also attended the meeting testified that Eckstein brought up the subject of Pilots Agree, said it was an issue and asked for comments but did not say that Pilots Agree members would be fired or terminated. He testified that Eckstein told the Pilots that what they did on their own time was their business, but that anything that occurred on the boats would be dealt with on an individual basis. On cross-examination by the General Counsel, he testified he did not recall all of the remarks made about Pilots Agree during the meeting and did not recall Eckstein saying anyone would be "released." He does recall the prohibition of using the radio to discuss Pilots Agree and his assumption was that some type of adverse employment action would take place if the employees violated this prohibition which he understood would include a prohibition against solicitation on behalf of Pilots Agree. He acknowledged that he is aware that the employees regularly discuss a variety of non-work-related matters on the radio which discussions are permitted by Respondent. He acknowledged that an inquiry as to whether the employees were members of the Union could have been one of the questions asked by Eckstein. Respondent's President Eckstein testified that at the meeting he talked about economics and competition and asked the employees to tell him about Pilots Agree and that only employee Wilson admitted being a member of Pilots Agree. He then questioned the em-

ployees about any complaints about working conditions and the principle response he received was that the employees wanted higher wages. He denied having made a threat that the employees would be released if they attended an upcoming union meeting.

Following the meeting, the Respondent sent a letter to each of the pilots and captains dated January 26, 1998, which was signed by its President Eckstein. In this letter Respondent told the pilots and captains that they were supervisors and could not join a union and if they did, they would be "dealt with" by Respondent. This letter also stated that Respondent would not negotiate with the Union.

Analysis

I credit the testimony of Robert Sharp that Eckstein told the employees they would be "released" if it was learned that they attended an upcoming meeting of Pilots Agree. I found his testimony to be specific, clear and unwavering and I find that this was an unlawful threat of discharge if the employees were found to support the Union. I do not credit Eckstein's denial that he said this. I thus find that this statement by Eckstein was a threat of discharge and violative of Section 8(a)(1) of the Act.

It is undisputed that Eckstein asked the employees whether they were members of the Union and inquired about the Union at this meeting. I find that this constituted an illegal poll of the employees concerning their union sympathies and unlawful interrogation concerning their support for the Union and violated Section 8(a)(1) of the Act.

I further find that Respondent violated Section 8(a)(1) of the Act by informing its employees in the letter of January 26, 1998 that it would not negotiate with the Union and that they would be "dealt with" if they discussed the Union while on the tugboat or used company equipment to discuss the Union.

B. Status of the Employees

I find that pilots Robert Sharp, Alvis Null, and Ferman Kellum were at all times material herein employees within the meaning of Section 2(3) of the Act. In the instant case the Respondent has asserted as an affirmative defense that its pilots Sharp, Null, and Kellum were supervisors within the meaning of Section 2(11) of the Act so as to exclude them from the protection accorded employees under Section 7 of the Act to engage in concerted activities concerning wages, hours, and other terms and conditions of employment. The burden is on the Respondent to demonstrate that its employees should be excluded from the protection of the Act as supervisors. The issue of supervisory status is to be decided on a case-by-case basis. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982); *Hicks Oils & Hicksgas*, 293 NLRB 84, 91 (1989); *Purolater Products*, 270 NLRB 694 (1984). In the instant case the evidence establishes that the pilots' principle function is to steer the tugboat and accompanying barges in tow from place to place as directed by the office and the captain of the tugboat. The captain and pilots alternate their duties in 6-hour shifts in the wheelhouse to steer the boat. The pilots as well as the captain while they are steering the boat, call to the mate or leadman for the assistance of the deck crew to serve as lookouts at locks and narrow bridges and the mate or leadman directs the work of the deck crew.

At the hearing pilots Sharp and Null replied in the negative to the questions propounded by the General Counsel concerning whether they had the authority to and/or performed the factors set out in Section 2(11) of the Act which define a supervisor. Thus both Sharp and Null testified they have never been told by Respondent that they could hire, transfer, suspend, layoff, recall, promote, discharge, reward, adjust grievances, discipline, make work assignments or direct employees in the performance of their work and that they had never performed these duties in their role as pilots. Kellum did not appear at the hearing.

Sharp also testified that he did not authorize overtime and if he had a problem with an employee he would notify the captain who would handle the problem. He also testified he could not make purchases on behalf of Respondent and had no authority to relieve an employee who wanted to leave the boat. Null testified he did not supervise any employees, that his job was in the wheelhouse to navigate the boat and in emergencies he called the captain. He testified that the deck hands report to the mate who reports to the captain and the oilier or assistant engineer reports to the engineer who reports to the captain.

The Respondent called Andrew Belza, employed as a mate, who testified he regarded pilots as supervisors but admitted that if a deckhand did not respond to a whistle by the pilot, he (Belza) would report this to the captain. Respondent also called Captain Jay Roy Pulley who is employed by Respondent as both a captain and a pilot. Pulley testified that when he serves as either a captain or a pilot, he maintains logs, and receives orders to add and drop off barges to the tow. Usually the captain diagrams the reconfiguration of the tow, but sometimes the pilot does so. Respondent also called Relief Captain Bob Wilson who has served as a pilot. He testified that pilots have the authority to reconfigure the tow. He also testified that if a leadman rejected an order, he would wake the captain up to take care of the matter. Respondent's President Eckstein testified that the pay scale for captains and pilots is similar and is three times that of all other crew personnel.

I find that the evidence supports the conclusion that pilots Sharp, Null, and Kellum were employees within the meaning of the Act and that Respondent has failed to meet its burden to establish that they were supervisors within the meaning of Section 2(11) of the Act so as to be excluded from the protection of Section 7 of the Act. Moreover the evidence submitted by Respondent was also insufficient to support a finding that its captains are supervisors within the meaning of Section 2(11) the Act. No evidence of their authority to discipline or otherwise supervise or responsibly direct employees was presented. *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995), enfd. denied 106 F.3d 484 (2d Cir. 1997).

C. The Strike

On April 3, 1998, pursuant to a call for a strike by Pilots Agree at midnight, tugboats of various tugboat companies including Respondent participated in the strike. In many instances the captains as well as the pilots participated in the strike. In the case of Sharp and Null, neither was on duty when the strike was called and it was the captains of their boat who actually pulled the tugboat and towage to the nearest landing

area, although both notified their captain that they were also participating in the strike and upon being relieved, left the boat. Null was actually ordered to go to another boat which had been pulled into a landing by Captain Pulley and upon Null's refusal to do so, was ordered off the boat he was on by Port Captain Colby.

On April 16, 1998, Respondent sent a letter to its regular pilots who were entitled to benefits, including Sharp and Null, informing them that they had been replaced and that their benefits were cancelled. Additionally, Respondent filled out termination forms for Sharp and Null designating that they had resigned and indicating they were not eligible for rehire. In the case of Kellum, who was a trip pilot and not entitled to benefits, the termination form indicates he resigned and does not contain any reference to rehire. Neither Sharp nor Null nor Kellum ever contacted the Respondent to inform the Respondent they wished to end their strike and return to work. Nor did Respondent offer to return them to work but rather treated their work stoppages as resignations. Sharp testified that in view of the threat of Respondent to release employees who were found to support the Union and in view of the January 26, 1998 letter, and the April 16, 1998 letter directed to him stating that he had been replaced, he believed he had been discharged. Null testified he believed he was discharged when Colby told him to get off the boat. He also testified that he did not contact anyone at the Respondent after he received the letter informing him of his replacement as he believed he was discharged. Kellum did not attend the hearing and the record is silent as to his participation in the strike, specific duties performed as a pilot, or the details of his leaving the boat other than the termination form prepared by Respondent indicating he had resigned. There is a notation on his termination report that Kellum called Respondent and stated that he was a member of Pilots Agree and would be pulling the boat over.

Analysis

In addition to its assertion that the tugboat pilots were supervisors, Respondent also contends that the captains were supervisors and contends that the action of the pilots in striking for recognition of a union which represented Respondent's supervisors was an act Respondent could not be legally compelled to undertake. Consequently Respondent concludes that the strike activity was unprotected, citing *Rapid Armored Truck Corp*., 281 NLRB 371 (1986). However, I find this contention has no merit in view of my finding that Respondent has not carried its burden of proving its assertion that its pilots and captains were supervisors. Furthermore as discussed by General Counsel and Charging Party in their briefs *Rapid Armored* involved a disqualification of certification of a bargaining unit under Section 9(b)(3) of the Act because it admitted to membership guards and employees other than guards. Section 9(b)(3) prohibits the certification of a unit of guards and nonguards. See *Sierra Vista Hospital, Inc.*, 241 NLRB 631 (1979), wherein the Board held that the inclusion of supervisors did not disqualify a labor organization from representing nonsupervisors.

Respondent further contends that the strike constituted mutiny and was therefore unprotected. I find no merit to this contention insofar as it relates to Sharp and Null. In the two incidents involving Sharp and Null, the pilots were not on duty when the boat was pulled into a landing by their captain. There was no proof they took any action except to inform Respondent's management they were on strike. Respondent presented no evidence concerning Kellum's participation in the strike other than the note on his termination report. I find *Southern S S Co. v. NLRB*, 316 U.S.C. 31, 62 S.Ct. 886 (1992), and 18 U.S.C. 2192 cited by Respondent does not apply to the facts in this case. Respondent further contends that the alleged discriminatees' act of tying up their boats and halting production was serious misconduct justifying their lawful termination, citing *Can-Tex Industries v. NLRB*, 683 F.2d 1183, 1186 (8th Cir. 1982).

I find the General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by Respondent's discharge of Sharp and Null. Respondent's animus toward the Union has been established by the Section 8(a)(1) violations as set out above. Respondent's knowledge of the engagement in the strike by Sharp, Null, and Kellum has also been established in this record by their unrebutted testimony and by the documentary evidence. Moreover the adverse employment actions of the discharges of Sharp and Null has also been established by Respondent's treatment of them as having resigned and the letter informing them that they had been replaced. Respondent contends the word "replaced" is a term of art referring to an employer's right to replace economic strikers. However the letter informing Sharp and Null that they had been replaced in combination with President Eckstein's previous threats if employees engaged in union activities and the ordering of Null off the boat when he refused to transfer to another boat, would certainly lead reasonable persons to the conclusion that they had been discharged. Moreover the termination reports of April 12, 1998, in the case of Sharp, and April 9, 1998, in the case of Null indicating that they had been terminated, on April 10, 1998, in the case of Sharp, and April 5, 1998, in the case of Null lend further support to the conclusion that they were discharged because of their participation in the strike.

In the case of both Sharp and Null, neither was on duty when the boats were pulled over by their captains. Thus there has been no showing that Sharp and Null engaged in any misconduct but rather they merely informed Respondent they were engaged in a strike. Sharp testified he remained on the boat for 7 days until he was relieved by Respondent. This does not appear to be misconduct. Null left the boat after being ordered to do so by Respondent and there is no evidence of any misconduct on his part. I thus conclude that the General Counsel has established a prima facie case that these two employees were discharged by Respondent in retaliation for their engagement in concerted activities by participating in the strike, which was protected activity under Section 7 of the Act. I find Respondent has failed to rebut the prima facie case by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

With respect to Kellum I find the evidence is insufficient to support a violation of the Act. Kellum was a trip pilot and there is no evidence that he was the recipient of any threats by

Respondent's management or that he would have been hired for another trip in any event or that he ever presented himself for availability for another trip or that Respondent took any actions toward him communicating in any form that he had been discharged.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Pilots Agree is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by

(a) Unlawfully interrogating and polling its employees concerning their union sympathies and activities.

(b) Threatening its employees that it would not bargain with the Union if the employees chose union representation.

(c) Threatening its employees that it would "release" them if they engaged in union activities.

(d) Threatening its employees that they would be dealt with if they discussed Pilots Agree while on the tugboat or used company equipment to discuss the Union.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Robert Sharp and Alvis Null, because of their engagement in protected strike activities.

5. Respondent did not violate Section 8(a)(1) and (3) of the Act with respect to the termination of employee Ferman Kellum.

6. The above unfair labor practices in connection with the business engaged in by Respondent as set out above have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies and purposes of the Act including the posting of an appropriate notice.

It is recommended that Respondent offer immediate reinstatement to Robert Sharp and Alvis Null to their former positions or to substantially equivalent ones if their former positions no longer exist, and that it make them whole for all loss of pay and benefits sustained as a result of the discrimination against them, with backpay and benefits to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest shall be computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 USC, Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent Marquette Transportation/Bluegrass Marine, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating and polling its employees concerning their union sympathies and activities.

(b) Threatening its employees that it would not bargain with Pilots Agree if they chose union representation.

(c) Threatening its employees that it would "release" them or that they would be "dealt with" if they engaged in union activities and/or discussed the Union while on the tugboat or used company equipment to discuss the Union.

(d) Discharging its employees because of their engagement in union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Post the attached notice and mail a copy thereof to all current employees and all employees employed by Respondent since January 1998.

(b) Within 14 days of the date of this Order, offer reinstatement to Robert Sharp and Alvis Null to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary, any employees in that position.

(c) Make Robert Sharp and Alvis Null whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision, with interest.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discrimination against Robert Sharp and Alvis Null and within 3 days thereafter notify them that this has been done and that the discriminatory action will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

As to any violations not specifically found, the complaint is dismissed.

Dated, Washington, D.C. June 30, 1999

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid and protection
To choose not to engage in any of these concerted activities

WE WILL NOT interrogate or poll our employees concerning their union sympathies and activities.

WE WILL NOT threaten employees that we will not bargain with Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO.

WE WILL NOT threaten employees that we will release them or that they will be dealt with if they engage in union activities.

WE WILL NOT discharge our employees because of their engagement in union activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer Robert Sharp and Alvis Null full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights previously enjoyed and will make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful action taken against Robert Sharp and Alvis Null and notify them within 3 days thereafter in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

MARQUETTE TRANSPORTATION/BLUEGRASS MARINE

Rosalind Eddins, Esq., for the General Counsel.
Bart Sisk, Esq. (The Kullman Firm), of Memphis, Tennessee, for the Respondent.
Samuel Morris, Esq. (Allen, Godwin, Morris, Laurenzi & Bloomfield), of Memphis, Tennessee, for the Charging Party.

SUPPLEMENTAL DECISION ON REMAND

LAWRENCE W. CULLEN, Administrative Law Judge. I issued my original decision in this case on June 30, 1999. In my decision I found that Respondent Marquette Transportation/Bluegrass Marine (Marquette) was in the business of providing towboat and barge inland waterway services and is an employer within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act). I also found Pilots Agree Association, of the Great Lakes And Rivers Maritime Region Membership Group of the International Organization of Masters, Mates And Pilots, ILA, AFL–CIO (Pilots Agree or the Union) was a labor organization of inland waterway tugboat pilots and captains formed to address issues of safety, working conditions and pay and other terms and conditions of employment, within the meaning of Section 2(5) of the Act.

In my decision I found as follows:

In the fall of 1997, the Union engaged in an organizational campaign among captains and pilots engaged in towboat and barge inland waterway services. On January 22, 1998, Respondent conducted a meeting among its captains and pilots. Near the end of the meeting Respondent's President John Eckstein inquired whether any of the employees in attendance were members of the Union and told them they would be "released" if they attended an upcoming union meeting. I found that the statement that they would be released was a threat of discharge violative of Section 8(a)(1) of the National Labor Relations Act (the Act). I found the inquiry about the Union was an illegal poll of the employees concerning their union sympathies and unlawful interrogation concerning their support for the Union and violative of Section 8(a)(1) of the Act. I also found that Respondent violated Section 8(a)(1) of the Act by informing its employees in its letter to them of January 26, 1998, that it would not negotiate with the Union and they would be "dealt with" if they discussed the Union while on the tugboat or used company equipment to discuss the Union.

I also found that on April 3, 1998, pursuant to a call by Pilots Agree at midnight, captains and pilots of various tugboat companies including pilots Robert Sharp, Alvis Null, and trip pilot Ferman Kellum all employed by Respondent participated in the strike. Sharp and Null were not on duty at the time and it was the captains of their boats who actually pulled the tugboat and towage to the nearest landing area. However, both notified the captain that they were participating in the strike. Null was ordered to go to another boat that had been pulled into a landing, refused to do so and was ordered off the boat.

On April 16, 1998, Respondent sent a letter to its regular pilots who were entitled to benefits, including Sharp and Null, informing them that they had been replaced and that their benefits were cancelled. Respondent also filled out termination forms for Sharp and Null indicating that they had resigned and that they were not eligible for rehire. I found that General

Counsel had established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by Respondent's discharge of Sharp and Null in view of the evidence presented at the hearing and that animus toward the Union had been established by the 8(a)(1) violations as found above. I found that the prima facie case had not been rebutted by the Respondent. I found the evidence was insufficient to support a violation of the Act with respect to Kellum who did not testify. Kellum was a trip pilot and there was no evidence he would have been hired for another trip or that Respondent took any actions toward him communicating in any manner that he had been discharged.

Central to my findings of the 8(a)(1) and (3) violations was a determination that the pilots were "employees" under Section 2(3) of the Act. My determination on this issue was as follows:

> I find that pilots Robert Sharp, Alvis Null, and Ferman Kellum were at all times material herein employees within the meaning of Section 2(3) of the Act. In the instant case the Respondent has asserted as an affirmative defense that its pilots Sharp, Null, and Kellum were supervisors within the meaning of Section 2(11) of the Act so as to exclude them from the protection accorded employees under Section 7 of the Act to engage in concerted activities concerning wages, hours and other terms and conditions of employment. The burden is on the Respondent to demonstrate that its employees should be excluded from the protection of the Act as supervisors. The issue of supervisory status is to be decided on a case by case basis. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982); *Hicks Oils & Hicksgas*, 293 NLRB 84, 91 (1989); *Purolater Products*, 270 NLRB 694 (1984). In the instant case the evidence establishes that the pilots' principle function is to steer the tugboat and accompanying barges in tow from place to place as directed by the office and the captain of the tugboat. The captain and pilots alternate their duties in six hour shifts in the wheelhouse to steer the boat. The pilots as well as the captain while they are steering the boat, call to the mate or leadman for the assistance of the deck crew to serve as lookouts at locks and narrow bridges and the mate or leadman directs the work of the deck crew.

At the hearing pilots Sharp and Null replied in the negative to the questions propounded by the General Counsel concerning whether they had the authority to and/or performed the factors set out in Section 2(11) of the Act which define a supervisor. Thus both Sharp and Null testified they have never been told by Respondent that they could hire, transfer, suspend, layoff, recall, promote, discharge, reward, adjust grievances, discipline, make work assignments or direct employees in the performance of their work and that they had never performed these duties in their role as pilots. Kellum did not appear at the hearing.

Sharp also testified that he did not authorize overtime and if he had a problem with an employee he would notify the captain who would handle the problem. He also testified he could not make purchases on behalf of Respondent and had no authority to relieve an employee who wanted to leave the boat. Null testified he did not supervise any employees, that his job was in the wheelhouse to navigate the boat and in emergencies he called the captain. He testified that the deckhands report to the mate who reports to the captain and the oilier or assistant engineer reports to the engineer who reports to the captain.

The Respondent called Andrew Belza, employed as a mate, who testified he regarded pilots as supervisors but admitted that if a deckhand did not respond to a whistle by the pilot, he (Belza) would report this to the captain. Respondent also called Captain Jay Roy Pulley who is employed by Respondent as both a captain and a pilot. Pulley testified that when he serves as either a captain or a pilot, he maintains logs, and receives orders to add and drop off barges to the tow. Usually the captain diagrams the reconfiguration of the tow, but sometimes the pilot does so. Respondent also called Relief Captain Bob Wilson who has served as a pilot. He testified that pilots have the authority to reconfigure the tow. He also testified that if a leadman rejected an order, he would wake the captain up to take care of the matter. Respondent's President Eckstein testified that the pay scale for captains and pilots is similar and is three times that of all other crew personnel.

I find that the evidence supports the conclusion that pilots Sharp, Null, and Kellum were employees within the meaning of the Act and that Respondent has failed to meet its burden to establish that they were supervisors within the meaning of Section 2(11) of the Act so as to be excluded from the protection of Section 7 of the Act. Moreover the evidence submitted by Respondent was also insufficient to support a finding that its captains are supervisors within the meaning of Section 2(11) the Act. No evidence of their authority to discipline or otherwise supervise or responsibly direct employees was presented. *Spentonbush/Red Star Companies*, 319 NLRB 988 (1995), enfd. denied 106 F.3d 484 (2d Cir. 1997).

Subsequent to my decision in this case, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001). Two circuit courts in *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001), and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000), issued decisions denying enforcement of the Board's decisions concerning the status of individuals similar to the pilots in this case. On June 28, 2001, the Board remanded this case to me for review in light of these three decisions and the issuance of a supplemental decision. I was also directed to address the issue of whether the record should be reopened to take additional evidence on the issue of whether the pilots "assign" and "responsibly direct" employees and on the scope or degree of "independent judgment" used in the exercise of such authority.

On July 10, 2001, I issued a Notice and Invitation to File Briefs with me on July 30, 2001, addressing the issues and matters set out by the Board's Order Remanding. On July 30, the General Counsel and Respondent filed their briefs. I subsequently received the Charging Party's brief which had been sent to an incorrect address. All briefs have been considered. With respect to whether the current record contains sufficient evidence for me to address the issues raised by the Board's Order, the General Counsel contends that the 2 days of testimony and substantial documentation in the record concerning the authority and job duties of the pilots is sufficient to address whether the pilots "assign" and "responsibly direct" employees and the degree of "independent judgment" exercised under such

authority. The General Counsel thus contends that the reopening of the record is not warranted as the current state of the record is sufficient for the administrative law judge to issue a supplemental decision addressing the issues raised by the Board's Order. Charging Party contends the record is sufficient to address the issues raised by the Board's Order. I was also directed to consider and make specific findings, including credibility, concerning the testimony of Andrew Belza. Respondent contends in his brief that the record should be reopened and additional testimony taken if I am not persuaded that the pilots are supervisors and that the complaint should be dismissed. General Counsel and counsel for Charging Party contend the record is sufficient to address the issues raised by the Board's Order.

Mate Andrew Belza testified concerning the duties of a pilot and the hierarchy of command on the tugboat and the tow. He has been a mate for 2-1/2 years, is a 6-year employee and the tugboats operate 24 hours a day, 7 days a week. On the back watch it is pilot, mate, and deckhand. Belza as the mate directs the work of the deckhands. The pilot is in charge of the vessel and the tow of barges and is the highest ranking official on the back watch. He is the counterpart of the captain on the forward watch. The mate directs the work of the deckhands which consists of chipping off old paint and painting, serving as a lookout, securing the tow of barges, assisting with the reconfiguration of the tow and with making locks on the upper Mississippi River on a frequent basis. On the front watch which is from 6 a.m. to 12 p.m. and from 6 p.m. to 12 a.m., the captain is in command, and the mate reports to the captain as does the engineer or oiler and the cook. On the back watch the pilot is in charge and calls out orders to the mate. Belza testified that although he directs the work of the deckhands, the pilot may change the priority of the work, require the deck crew to perform other tasks as required such as repairing the sounder, replacing lights that have burned out, and serving as lookout in making locks or in inclement weather with poor visibility. Normally the pilot contacts the mate and informs him of a change in priority such as in an instance when land-based management has called in an order to drop off or pick up barges. The mate will then direct the deckhands in the performance of the assignment he has been given by the pilot. On occasion the pilot will contact the deckhands himself when the mate is in another location. The mate and the deckhands are expected to follow the orders of the pilot and failure to do so will result in termination which will be carried out by land-based management on the pilot's and captain's recommendations. The pilot is answerable for any mishaps that occur with the tugboat and the tow by virtue of his license and is subject to Coast Guard regulations and scrutiny. He is questioned by Coast Guard officials in connection with any investigations following accidents. The situation confronting pilots in the operation of the tugboat and tow is constantly changing due to weather changes, levels of the river and current flows, the making of different locks, obstacles in the river, bridges, and an excess of pleasure boats in the area. It is the pilot's responsibility to safely navigate the tugboat and the tow through this constantly changing situation and it is essential that the mate and the deck crew follow the orders of the pilot. I fully credit the testimony of Belza as corroborated by Captain Jay Roy Pulley and Relief Captain Bob Wilson who testified in Respondent's case. I find Belza's testimony to be detailed and straightforward. He did not attempt to embellish his testimony but readily conceded his lack of specific knowledge of Trip Pilot Kellum with whom he had only sailed on one occasion. Although he had not sailed with Null or Sharp, his description of the duties of the pilot and the work relationship of the pilot, mate, and deck crew was relevant and material in outlining the level of the pilots' supervisory authority.

ANALYSIS

After a review of the General Counsel's, Charging Party's, and Respondent's briefs and the record as a whole, I find the record contains sufficient evidence for the undersigned to address the issues raised by the Board's Order.

Section 2(3) of the National Labor Relations Act excludes supervisors from the protection of the Act. 29 USA §152(3). Section 2(11) of the Act defines supervisor as:

> Any individual having *authority, in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, or discipline other employees, *or responsibly to direct them*, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgement.* [Emphasis added.]

Section 2(11) requires an affirmative answer to three questions, if an employee is to be deemed a supervisor. *NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994). (1) Does the employee have authority to engage in one of the 12 activities listed in Section 2(11); (2) Does the exercise of that authority require the use of independent judgement; and (3) Does the employee hold their authority in the interest of the employer? For the reasons hereinafter set out in this decision, I find that each of the above questions should be answered in the affirmative.

With respect to the Supreme Court's ruling in *Kentucky River*, the Court upheld the Board's rule that the burden of proving Section 2(11) supervisory status rests on the party asserting it. As I found in my decision that the burden of proving Section 2(11) supervisory status of the pilots rested on the Respondent, this ruling is consistent with the Supreme Court's ruling in *Kentucky River*. In *Kentucky River*, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s definition of the term "supervisor." The Court rejected the Board's interpretation that, i.e., registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary or professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. The Court found the Board's interpretation of "independent judgment" to be inconsistent with the Act. However the Court recognized that the Board has discretion to determine whether the scope or degree of "independent judgment" meets the statutory threshold. The Court also left open the question of the interpretation of the Section 2(11) definition of supervisors and the Section 2(12)

definition of professionals and the question of the interpretation of the Section 2(11) supervisory function of "responsible direction" noting the possibility of distinguishing employees who direct other employees from those who direct them in specific tasks.

General Counsel notes that the Court rejected the Board's interpretation that the health care employees in *Kentucky River* did not use "independent judgment" when they exercised ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. General Counsel notes that the Court conceded that the Board has the discretion to determine, within reason, what scope of discretion qualifies for supervisory status. General Counsel argues that it is thus within the discretion of the Board to determine whether the judgment associated with any enumerated Section 2(11) authority satisfies the statutory threshold to such a degree that it constitutes independent judgment. She contends that the Court accepted the Board's analysis and decision in *Chevron Shipping Co.*, 317 NLRB 379 (1995), that the individuals at issue were not supervisors but left open the question of the possibility of interpreting the Section 2(11) supervisory function of "responsible direction" by distinguishing employees who direct the manner of other's performance of discrete tasks and who are thus Section 2(3) employees from those who direct other employees and are thus Section 2(11) supervisors.

General Counsel argues that the record as a whole, fails to establish that the pilots have the authority to hire, transfer, suspend, lay off, recall, promote, reward employees, or to adjust grievances, or to effectively recommend any of these indicia of supervisory status. General Counsel contends in brief that "the evidence establishes that any judgment pilots might exercise in performing nominally supervisory functions, such as assigning or directing the work of employees, falls well below the statutory threshold required by the Act to constitute independent judgment. Thus, to the extent the deckhands may receive direction in the performance of their work, it is no different from the type of direction given by the employees at issue in *Chevron USA*, 309 NLRB 59 [(1992)], wherein the Board reasonably found that such direction was not that of a supervisor, but of a more experienced employee over one who is less skilled." General Counsel also cites *A. L. Mechling Barge Lines, Inc.*, 192 NLRB 1118, 1119 (1971).

The Court in *Brusco*, directed the Board to reconcile its decision with two earlier Board decisions finding pilots of tugboats were Section 2(11) supervisors. General Counsel argues in brief that the:

> Earlier Board decisions were made at a time when the pilots and mates were perceived by both management and crew personnel as officers. The term officer had a precise meaning in the industry, as one with authority to issue orders. Refusal to comply with these orders resulted in discipline. Evidence in more recent cases fails to establish such. Moreover, those decisions placed undue weight on the potential danger involved in the operation of a complex piece of equipment. Thus the later decisions suggest that the Board has become cognizant of the erosion of the traditional authority of wheelhouse personnel, particularly pilots. Moreover, the Board's latest determination that operation of complex machinery is insufficient to confer supervisory status upon an individual has been adopted by the Circuit Court.

See *Cooper/T Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999). General Counsel thus concludes that the decision of the administrative law judge in the instant case is not inconsistent with prior Board precedent and *Brusco* does not warrant a reversal.

Charging Party contends that "Because neither the interpretation of 'independent judgment' that was used by the Board in *Kentucky River* nor the application of that interpretation was incorporated into the instant case, the Supreme Court's decision in *Kentucky River* is not applicable to the present case." Charging party argues that even if *Kentucky River* is applicable to this case, it does not affect the status of the pilots. It contends that the Supreme Court left open the possibility of interpreting the supervisory function of responsible direction by distinguishing employees who direct the manner of other's performance of discrete tasks from employees who direct other employees. Charging Party contends the pilots in the instant case fall into the former category. They do not direct other employees. Rather they direct the manner of the employees' performance of tasks while on the vessel. Charging Party argues the authority given to pilots to assign or responsibly direct does not reach the level of authority required to qualify them as supervisors under the Act.

Respondent contends in its brief that the evidence produced at hearing concerning the supervisory status of the pilots particularly in view of the *Brusco* case and *Local 28 International Organization of Masters, Mates & Pilots*, 136 NLRB 1175 (1962), enfd. 321 F.2d 376 (D.C. Cir 1963), and *Bernhardt Bros. Tugboat Service*, 142 NLRB 851, enfd. 328 F.2d 757 (7th Cir. 1963), establishes that Respondent's pilots are supervisors under Section 2(11) of the Act as they have the responsibility to assign work and direct other employees while on the back watch. Respondent urges that Belza's detailed testimony should be fully credited. It was supported by the testimony of Captain Pulley and Relief Captain Wilson who testified in this case and was reluctantly corroborated by alleged discriminatees Null and Sharp. It clearly establishes that the pilot is the sole person in charge and is the highest level official on duty when he is on the back watch. He has the authority to navigate the vessel and barges, reprioritize work, and order the mate and other employees to stand lookout, check the sounder for water levels, tie and untie barges, assist in the making of locks and all that is necessary in the safe navigation of the vessel and the barges. The authority of the pilot is absolute and must be obeyed.

I find based on Belza's testimony as corroborated by other witnesses and the record as a whole that the Respondent has met its burden of proof in establishing that the pilots are supervisors within the meaning of Section 2(11) of the Act. I thus modify my previous decision in this regard.

In my previous decision I credited the testimony of the pilots who testified that they did not have the authority and/or perform the factors set out in Section 2(11) of the Act which de-

fine a supervisor. They testified they do not have the authority to hire, transfer, suspend, layoff, recall, promote, reward, discharge, adjust grievances, or discipline employees and have never done so in the performance of their work. They testified they did not make work assignments or direct employees in the performance of their work but rather merely called to the mate or lead deckhand for lookout and other duties connected with going through locks in the river and if they observe any problems with the tow. They contended the mate handles this and directs the work of the deck crew. In *Bernhardt* cited in *Brusco*, the trial examiner with Board approval concluded that the tugboat pilots involved in that case had the authority to direct crew members other than routinely. Relying on credited testimony he cited the pilots responsibility at 854 "on watch, relying upon his own experience and judgment, decides if the weather is bad enough to require a lookout against shifting navigational hazards, and if so when and where to place the lookout and which crew member should be so assigned." The trial examiner concluded at 854 that the pilots had "authority responsibly to direct the crew members on their watch and that the exercise of such authority is not merely routine, but on the contrary requires the use of independent skill and judgment." The trial examiner thus concluded that the pilots were supervisors within the meaning of the Act. Similarly in *Local 28*, the ALJ with Board approval, found pilots were supervisors for the same reasons.

In *Brusco*, the D.C. Circuit Court of Appeals denied enforcement and remanded the case to the Board. In its decision the D.C. Circuit remanded for the Board "to explain why its decision in this case is not inconsistent with *Local 28* and *Bernhardt* or alternatively, to justify its apparent departures." The Board has directed me to reconsider my decision in view of *Kentucky River*, *Brusco*, and *Empress*. In my initial decision in this case I found that testimony of the pilots' assignment of work was merely a direction to the mate or lead deckhand who carried out the order. However, in the earlier *Bernhardt* and *Local 28* decisions, on virtually identical facts, the trial examiners concluded, and the Board adopted their conclusions, that based on the safety hazards and requirement that pilots make decisions under loosely constrained conditions, the pilots did indeed exercise direction over significant matters requiring the use of independent judgment. My review of *Bernhardt* and *Local 28* convince me that although I credited the pilots who testified at the initial hearing that they did not assign work to the crew but merely called to the mate or lead deckhand who directed the work of the crew, it is obvious that the pilots do more than this in the direction of the operation of the boat and barges as they are navigated through the inland waterways. The orders of the pilot must be followed if the tugboat and the tow are to be safely navigated to their destinations. The pilots in the instant case perform the same duties as those in the *Bernhardt* and *Local 28* cases. I thus modify my determination with respect to the assignment of work and find that the pilots in the instant case direct the work of the crew and do so with the exercise of significant independent judgment under conditions that are loosely constrained by Respondent. I find that the pilots have authority in the interest of the employer to assign work to the crew and to responsibly direct them and that such authority is not of a routine or clerical nature but requires the use of independent judgment. Since the Board has directed me to analyze this case as viewed in light of the above-cited precedents, I am constrained to reconsider my conclusion that the pilots were not supervisors. In so doing and in reliance on the precedent of *Bernhardt* and *Local 28*, I find the pilots were supervisory employees at the time they engaged in the work stoppage which was not protected insofar as it affected them. I thus find that the pilots were not protected by Section 7 of the Act and that Respondent did not violate the Act by the statements made by its President Eckstein, the letter sent to the pilots or by the termination of the pilots. But see *McAllister Bros.*, 278 NLRB 601, 613 (1986), where captains were held not to be supervisors as the boat personnel were experienced and qualified to perform jobs without constant supervision.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Pilots Agree is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein, pilots Null, Sharp, and Kellum were supervisors under Section 2(11) of the Act.
4. The inquiries made by Vice President John Eckstein and the remarks directed to the captains and pilots at the January 22, 1998 meeting and Respondent's letter to the pilots and captains of January 26, 1998, were not violative of the Act as the captains and pilots were supervisors under Section 2(11) of he Act.
5. As supervisors their engagement in the strike was unprotected and Respondent did not violate the Act by its termination of pilots Null, Sharp, and Kellum for their engagement in the strike.

The complaint is dismissed in its entirety.

Dated, Washington, DC August 28, 2001

MARQUETTE TRANSPORTATION/BLUEGRASS MARINE